No. 48222-3-II

Court of Appeals, Div. II,
of the State of Washington

Ernest Kirk George,

Appellant,

v.

John Danielsen,

Respondent.

Brief of Appellant

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1. Introduction

John Danielsen ordered his logger to cut 18 trees from the property of his neighbor to the south, Ernest Kirk George, believing the cut would improve his view. Danielsen had never seen his property corners, did not have a survey done, and did not consult with George to locate the property line. Instead, he had a neighbor run a measuring tape from the opposite end of his property and guessed that an old cattle fence marked the boundary. The cattle fence was actually from five to fifty feet on George's side of the true property line.

Comparing the reckless manner in which Danielsen attempted to locate the property line with case law on the mitigation defense to a timber trespass claim, the only possible conclusion is that the trespass was not casual or involuntary and that Danielsen did not have probable cause to believe the trees were his own. On George's motion for summary judgment, the trial court should have determined that Danielsen could not prove the mitigation defense as a matter of law and therefore damages should have been tripled.

Additionally, the waste statute, RCW 4.24.630, by its plain terms applies whenever a person goes onto land of another and removes trees. George asks the Court to overrule *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015), because the *Gunn* court did not consider the direct conflict between the waste statute's exception and its general provisions

2. Assignments of Error

Assignments of Error

1. The trial court erred in denying George's motion for partial summary judgment on the issues of RCW 4.24.630 and RCW 64.12.040.

2. The trial court erred in granting Morger's cross-motion for partial summary judgment, dismissing George's claim under RCW 4.24.630.

3. The trial court erred in denying George's post-trial motion for judgment notwithstanding the verdict on the issues of RCW 4.24.630 and RCW 64.12.040.

Issues Pertaining to Assignments of Error

1. Whether Danielsen did not have probable cause to believe the trees at issue were on his own land, as a matter of law (assignments of error #1 and 3).

2. Whether the remedies provided in RCW 4.24.630 apply when a person goes onto land of another and removes trees, damaging the landscape (assignments of error #1-3).

3. Statement of the Case

Ernest Kirk George owns residential property in Quilcene. CP 84. The property includes a picturesque home on the side of a hill. *Id.* The large stand of trees that once stood behind it provided a beautiful setting for the home and a buffer isolating the property from uphill neighbors. CP 84, 104.

John Danielsen purchased the adjacent, uphill property to the north in November 2012. CP 223. It was advertised as a potential view lot, if the

trees were cleared. CP 86. After purchasing the property, Danielsen hired Dan Morger to remove the trees. CP 48, 52. Danielsen wanted to open up a view of Quilcene Bay and the Olympic Mountains from the top of his property. *See* CP 79 (at 28:2-21), 80 (at 30:22-25), 86.

Before cutting, Morger marked what he believed to be the southern boundary line of Danielsen's property. CP 77 (at 20:7-21:21). Danielsen had identified a green T-bar metal post as the southeast corner of the property. CP 75 (at 11:3-24). Morger discovered a second T-bar post in the middle of the woods, in line with a wooden post near the western boundary. CP 76-77 (at 16:22-18:3). Morger marked the line running through these posts. CP 77 (at 21:10-24.) Danielsen initially confirmed that Morger had marked the correct line. CP 77-78 (at 21:25-22:10). George testified that the T-posts marked the true boundary and that he would have told Danielsen and Morger so if either would have asked him. CP 85.

Morger cut Danielsen's trees to this marked line. CP 78 (at 24:7-25). Danielsen, apparently unsatisfied, walked the east side of the property with his neighbor, a tape measure, and a "plat map" to try to relocate the property boundaries. *E.g.*, CP 52-53 (at 8:25-10:7, 11:23-12:3), 225. Together they concluded that the southeast corner of Danielsen's property was located near an old cattle fence. CP 54 (at 15:8-16:8, 17:12-25), 59 (at 36:19-37:14), 225. In fact, the cattle fence was located entirely on George's property, from six to fifty feet south of the true boundary line, roughly following the curve of the forest edge, separating the grassy field to the south from the forest and brush

to the north. CP 81 (at 34:16-35:9, 36:11-22), 85. Danielsen ordered Morger to cut all the way to the cattle fence. CP 55 (at 19:3-17), 78-79 (at 25:18-26:6).

Morger questioned the accuracy of Danielsen's new line, pointing out the T-posts forming a straight east-west line. CP 79-80 (at 29:18-30:5.) Morger suggested they contact the neighbor to the south (George), but Danielsen said, "Those are my trees. Cut them." CP 80 (at 31:1-15). Danielsen mentioned that cutting the additional trees would improve his view. CP 79 (at 28:8-14), 80 (at 30:6-25). Morger acquiesced and cut to the fence line. *See* CP 53 (at 13:20-25).

Danielsen later admitted that his location of the boundary was incorrect. CP 64 (at 54:3-20). At Danielsen's command, Morger had cut 18 trees from George's property, destroying the home's scenic backdrop. CP 94, 104-05.

George sued Danielsen and Morger for timber trespass under both RCW 4.24.630 and RCW 64.12.030. CP 1-2. After discovery, George brought a motion for partial summary judgment, seeking, among other things, a determination that Danielsen and Morger were liable under both statutes and that damages would be tripled because Danielsen and Morger could not prove a mitigation defense. CP 7-8, 11-25. Morger made a cross-motion for partial summary judgment, seeking to dismiss George's claims under RCW 4.24.630. CP 185-88. The trial court dismissed the RCW 4.24.630 claims and found Danielsen and Morger liable for at least single damages, leaving the issues of mitigation and the amount of damages for trial. CP 280-81.

Morger settled; George proceeded to trial against Danielsen. The jury awarded landscape damages of $12,500 and found that the trespass was not casual or involuntary but that Danielsen did have probable cause to believe that the trees were on his own land. CP 355-56. The trial court entered judgment for $14,425.50 (including costs). CP 362-63. George appeals the trial court's summary judgment decision, which dismissed his claim under RCW 4.24.630 and failed to find that Danielsen could not prove mitigation as a matter of law. The trial court denied George's motion for judgment notwithstanding the verdict on these same issues. CP 332-36, 350-51.

4. Summary of Argument

The issue of mitigation under RCW 64.12.040 should never have gone to the jury. The evidence presented at summary judgment left only one reasonable conclusion: Danielsen's cutting of George's trees was not casual or involuntary and Danielsen did not have probable cause to believe the trees were on his own property. Danielsen utterly failed to make reasonable efforts to locate the boundary with certainty. This Court should reverse the trial court's summary judgment order on this issue and remand with instructions to triple the damages found by the jury.

The trial court also erred in dismissing George's claim under RCW 4.24.630. George asks this Court to overrule *Gunn v. Riely*. because the *Gunn* court did not consider the direct conflict between the waste statute's exception and its general provisions, which must be harmonized in a manner

that gives meaning to all provisions. This Court should do so and remand this case for a determination of damages under the waste statute.

5. Argument

5.1 Summary judgment orders are reviewed de novo.

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court engages in the same inquiry as the trial court. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). The court views the facts in a light favorable to the nonmoving party, but the motion should be granted if the evidence supports only one reasonable conclusion. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014). A court should grant summary judgment when the nonmoving party fails to make a showing sufficient to establish a claim or defense on which it bears the burden of proof at trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

5.2 The trial court erred in denying summary judgment because the only reasonable conclusion from the undisputed evidence was that Danielsen did not have probable cause to believe the trees were on his land.

As a default, the timber trespass statute provides triple damages to the successful plaintiff. "Once the plaintiff has proven the trespass and the damages, the burden shifts to the defendant to show the trespass was casual or involuntary or was done with probable cause to believe the land was his own." *Seattle-First Nat'l Bank v. Brommers*, 89 Wn.2d 190, 197-198, 570 P.2d

1035 (1977). Once the fact of trespass has been established, the only way for a defendant to escape triple damages on summary judgment is to present evidence from which a reasonable trier of fact could conclude that the trespass was casual or involuntary. *See Smith v. Shiflett*, 66 Wn.2d 462, 464-465, 403 P.2d 364 (1965) ("treble damages will be imposed … unless those trespassing exculpate themselves under the provisions of RCW 64.12.040").

As with any question of fact, the mitigation defense can be disposed of on summary judgment. *E.g., Hill v. Cox*, 110 Wn. App. 394, 406, 41 P.3d 495 (2002) (affirming summary judgment of treble damages in a timber trespass case), *rev. denied,* 147 Wn.2d 1024, 60 P.3d 92 (2002). "[W]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014). The burden of proving mitigation to single damages is on the defendant. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 594, 278 P.3d 157 (2012).

Danielsen failed to present evidence sufficient to establish the mitigation defense. The material facts were undisputed. The only reasonable conclusion was that the trespass was not casual or involuntary and that Danielsen did not have probable cause to believe the trees were on his land. "A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040." *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 96, 173 P.3d 959 (2007). It is not a mitigating factor for the trespasser to be acting in good faith. *Sherrell v. Selfors*, 73 Wn. App. 596, 604, 871 P.2d 168 (1994).

5.2.1 Timber trespass case law requires reasonable efforts to locate the property boundary with certainty.

A review of timber trespass case law demonstrates that the mitigation defense fails as a matter of law where the defendant has not taken any reasonable steps to determine the property boundary with certainty, such as conducting a formal survey. For example, in *Smith v. Shiflett*, 66 Wn.2d 462, 466, 403 P.2d 364 (1965), the defendant, Shiflett, "never made any pretense of making a survey; nor did he attempt to find out who owned the land where he was cutting." The court held that Shiflett "did not bring himself within the letter or the spirit of RCW 64.12.040." *Id.* at 467. The court observed, "The best that can be said for Shiflett is that he didn't deliberately cut the trees, knowing them to belong to the plaintiffs; but he proceeded without making any survey, or any adequate investigation, and without probable cause to believe that the trees being cut were on land where he had authority to be." *Id.* at 466.

The mitigation defense similarly failed in *Fredericksen v. Snohomish County*, 190 Wash. 323, 327, 67 P.2d 886 (1937), in which the county's road crew "had never got permission from plaintiff or any other person to cut these shrubs across the line. No effort was made to determine the line before the cutting, except that they assumed that the telephone poles were 5 feet from the property line." The court held, "It necessarily follows that the cutting of the trees and the slashing of the shrubs were done in disregard of the rights of the respondent, and that there was in it an element of wilfulness." *Id.*

In *Nethery v. Nelson*, 51 Wash. 624, 626, 99 P. 879 (1909), "The appellants made no effort whatever to locate the section line before cutting the timber, and found no difficulty whatever in marking the location after the trespass was committed. The claim that they mistook a blazed zigzag trail through the forest for a section line evidently did not impress the jury and does not impress this court." The court held that this evidence "fully sustained" the conclusion that the trespassers did not have probable cause to believe that the land was their own. *Id.*

In *Sherrell v. Selfors*, 73 Wn. App. 596, 604, 871 P.2d 168 (1994), the court held that the trespassers, Selfors, had failed to meet their burden of proving mitigation. The court rejected Selfors' arguments that surveys were not customary in that area; that they tried to contact the plaintiff property owner; that they relied on the community manager's description of the line; and that they were acting in good faith without a profit motive. *Id.* Because Selfors failed to conduct a survey, failed to ascertain the boundary from existing markers, and failed to consult with the property owner, they had failed to meet their burden of proof. *Id.* In other words, none of Selfors' arguments were valid mitigating factors as a matter of law.

In *Longview Fibre Co. v. Roberts*, 2 Wn. App. 480, 481, 470 P.2d 222 (1970), "Two of defendant's employees, both hired as timber fallers and neither of whom had any knowledge, skill, training or experience in running boundary lines, attempted unsuccessfully to locate and run the south line." The defendant made no further efforts to locate the boundary before cutting. *Id.* The court reversed a trial court judgment of single damages, holding,

> The essence of the element of willfulness in this case lies in the defendant's failure to locate a boundary; his failure to employ persons even reasonably skilled or experienced in running boundary lines; his ignoring the request of his own employees to employ persons so skilled; his failure to consult with plaintiff in any manner in an attempt to locate boundary corners; his decision to proceed with the logging operations without having any reasonable knowledge of the location of the corners or the line…. Those facts conclusively demonstrate to us that the defendant elected to proceed with the operations in reckless disregard of the probable consequences.

Id. at 483-84.

Even where a defendant conducted a survey, the mitigation defense failed where the survey was poorly done. In *Blake v. Grant*, 65 Wn.2d 410, 412, 397 P.2d 843 (1964), the mitigation defense failed because the defendants "attempt[ed] to establish the boundary line without locating a proper starting point; [failed] to talk to adjoining owners about the true line; [failed] to see a previously blazed dividing line; and [made] a major error in direction in running the east-west line."

The takeaway from all of these cases is that, in order to prove mitigation under RCW 64.12.040, a defendant must be able to show that he had knowledge of reliable facts creating probable cause to believe the land was his own. Anything less, under the case law, is willful or reckless and subject to treble damages. An erroneous amateur survey of the kind conducted by Danielsen is not enough to prove mitigation.

5.2.2 Danielsen failed to prove that he made reasonable efforts to locate the property boundary.

The undisputed facts and circumstances in this case demonstrate Danielsen's willfulness and lack of probable cause. Danielsen was aware of the boundary line initially marked by Morger, which was based on existing markers on or near the true line. Danielsen showed Morger the green T-bar metal post that Morger used as the southeast corner. CP 75 (at 11:3-24). Morger discovered a second T-bar post in the middle of the woods, in line with a wooden post near the western boundary. CP 76-77 (at 16:22-18:3). Morger marked the line running through these posts. CP 77 (at 21:10-24.) Although Danielsen would later testify that Morger's line was only a rough estimate, Danielsen told Morger at the time that it was the correct boundary line. CP 77-78 (at 21:25-22:10).

Danielsen had indicated to Morger at some point that one of his purposes in cutting trees on his property was to clear a better view. CP 79 (at 28:8-14), 80 (at 30:6-25). Other evidence supports this motive. CP 86. Only after Morger had cut to the initially flagged property line did Danielsen show dissatisfaction with that line. CP 78 (at 24:7-25).

Danielsen admitted that he is not competent to locate boundaries on the ground from a survey map. CP 62 (at 46:16-24). He could not understand the legal description in his deed. CP 57 (at 27:20-25). Instead, he and his neighbor used a "plat map" (CP 49) that showed the eastern boundary of Danielsen's property running from the "SE corner" of the neighbor's property, 111.5 feet south to a "first stake," then continuing another 178 feet

to the southeast corner of Danielsen's property. CP 49, 57 (at 28:15-29:1). The "plat map" bears a clear warning against relying on its accuracy: "This sketch is not based on a survey of the property." CP 49.

Danielsen and his uphill neighbor found a stake that they believed was the "SE corner." CP 52-53 (at 9:8-10:7.) Danielsen stood at the stake, holding the end of a measuring tape, while his neighbor walked downhill until he found another stake, which they believed was the "first stake" shown on the plat map. CP 58 (at 31:10-25, 32:20-33:13). They did not use a compass to check the direction of the line they were running. CP 54 (at 15:3-7), 63 (at 52:6-53:9). The distance they measured from "SE corner" to "first stake" was not the 111.5 feet shown on their map. CP 59 (at 35:21-36:6). Nevertheless, they continued, subtracting the number they measured from the total distance of 289.5 feet and running the tape the resulting distance down toward the George property. CP 59 (at 34:7-18, 35:21-25). The neighbor read off the measurements and stopped close to the east end of George's old cattle fence. CP 59 (at 36:19-37:24).

Based on this amateur measurement, Danielsen concluded that the old cattle fence was his southern property line. CP 52 (at 9:22-10:4). However, Danielsen made no attempt to even confirm that the fence ran in an east-west line. CP 63 (at 52:6-53:9.) In fact, the old cattle fence was entirely on George's property, running on a diagonal to the southwest, from six to 50 feet south of the true property line. CP 64 (at 54:3-5), 85.

Danielsen was not certain that he had found his correct boundary lines. CP 55 (at 18:1-4.) Nevertheless, he ordered Morger to cut all the way to

the cattle fence. CP 55 (at 19:3-17). Morger questioned the accuracy of Danielsen's line and suggested they contact George, but Danielsen said, "Those are my trees. Cut them." CP 80 (at 31:1-15). Danielsen assured Morger that Danielsen would take responsibility, according to their contract. CP 78-79 (at 25:21-26:6). Danielsen never contacted George to locate the property line. CP 85. Danielsen never had a professional survey performed. CP 54 (at 17:2-9).

Danielsen's amateur, unskilled, erroneous "survey" of the eastern property line was insufficient, as a matter of law, to create probable cause to believe the trees were on Danielsen's land. Danielsen and his neighbor used an unreliable map, did not confirm the direction of the line they ran, and ignored a discrepancy between the map and their first measured distance. Danielsen made no effort whatsoever to locate the actual southern boundary line, simply assuming that it was the fence line, even though the fence did not run in an east-west line. Danielsen ignored the boundary located by Morger, which was marked by existing metal T-posts along the line and a wood post on the west end and which turned out to be the true boundary. Had Danielsen contacted George, he would have confirmed that the T-posts marked the true boundary.

Like the cases above, Danielsen failed to conduct a professional survey or to employ persons even reasonably skilled in running lines. *See Longview*, 2 Wn. App. at 484. He made a major error in measuring the distance to the southeast corner. *See Blake*, 65 Wn.2d at 412. He not only failed to recognize, but deliberately ignored, the true property line indicated

by existing markers and flagged by Morger. *See Sherrell*, 73 Wn. App. at 604. He unconvincingly mistook a diagonal-running cattle fence on George's property for an east-west running boundary line. *See Nethery*, 51 Wash. at 626. He simply assumed that a cattle fence would be built on the boundary. *See Fredericksen*, 190 Wash. at 327. He never contacted George to determine the true boundary. *See Sherrell, Blake.* He ignored the pleas of his logger to do so. *See Longview*, 2 Wn. App. at 484. The circumstances also demonstrate that he had an ulterior motive to cut more trees to improve his view. *Cf. Sherrell*, 73 Wn. App. at 604 (even good faith is not a valid mitigating factor).

> "The best that can be said for [Danielsen] is that he didn't deliberately cut the trees, knowing them to belong to the plaintiffs; but he proceeded without making any survey, or any adequate investigation, and without probable cause to believe that the trees being cut were on land where he had authority to be."

Smith v. Shiflett, 66 Wn.2d at 466 (altered to fit the present context).

The only reasonable conclusion is that Danielsen did not have probable cause to believe the trees were on his own property. The boundary could only be competently located by a survey or by agreement with George. Danielsen did neither. He did not make a reasonable effort to locate the boundary with certainty. As a matter of law, the trespass was not casual or involuntary and Danielsen did not have probable cause to believe the trees were on his property. The trial court should have granted George's motion for partial summary judgment and not submitted the question of mitigation to the jury. This Court should reverse the summary judgment order and

remand to the trial court with instructions to triple the damages in the final judgment.

5.3 The trial court erred in dismissing George's claim under RCW 4.24.630 because the statute's plain terms apply to every person who removes timber from land of another.

5.3.1 The *Gunn* court did not address the direct conflict between the statute's exception and its general provisions.

In the recent case of *Gunn v. Riely*, 185 Wn. App. 517, 344 P.3d 1225 (2015), this Court held that the waste statute, RCW 4.24.630, does not apply in cases of timber trespass. In *Gunn*, Rielys claimed an easement right over a "grassy path" on Gunn's property. *Gunn*, 185 Wn. App. at 520. Rielys hired a contractor, who they told to use the grassy path for access, knowing that the contractor would have to cut trees along the path. *Id.* Prior to trial, the parties stipulated that the 107 trees were worth a total of $153. *Id.* at 521. In addition to the value of the trees, Gunn sought costs to restore the land, investigative costs, and attorney fees, under RCW 4.24.630. *Id.* at 522. The trial court applied RCW 4.24.630 and awarded the damages Gunn sought.

On appeal, the court held, "the waste statute does not provide damages when the timber trespass statute does." *Gunn*, 185 Wn. App. at 524. Without addressing the meaning of the waste statute's general provisions, the court matter-of-factly stated, "RCW 4.24.630(2) explicitly excludes its application where liability for damages is provided under RCW 64.12.030, the timber trespass statute." *Id.* at 525. The court then turned to the timber

trespass statute to determine when that statute applies, noting, "The cases interpreting RCW 64.12.030 are clear that it governs direct trespass against a plaintiff's timber, trees, or shrubs." *Id.* at 526. The court reasoned that because there was no evidence of damage to the land, the case fit squarely within the bounds of the timber trespass statute, precluding application of the waste statute. *Id.* at 527.

George asks this court to overrule *Gunn* because the *Gunn* court did not address the direct conflict between the waste statute's exclusion and its general provisions.

5.3.2 The first general provision in the waste statute applies by its plain terms to every person who goes onto the land of another and removes timber.

The waste statute was enacted in 1993 to provide additional remedies to landowners who suffered vandalism, property damage, or waste or removal of valuable property from their land. *See Gunn*, 185 Wn. App. at 525 n.6. The statutory language explicitly applies the statute's additional remedies to cases of timber trespass:

> **Every person who goes onto the land of another and who removes timber,** crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, **is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.**

RCW 4.24.630(1) (emphasis added). The plain language of the statute's general provision, subsection (1), squarely applies to every person who goes onto the land of another and removes timber.

This general provision does not require any other damage other than the removal of timber. Waste or injury to the land or to improvements on the land are a separate, alternative basis for liability, separated from "removes timber" by a disjunctive "or". By this plain language, the legislature clearly intended the waste statute to apply to every person who goes onto the land of another and removes timber, even if the person does not cause any other damage to the land.

The exclusion in subsection (2)—"This section does not apply in any case where liability for damages is provided under RCW 64.12.030"—if taken at face value, directly conflicts with the statute's very first general provision in subsection (1). Both the general provision in RCW 4.24.630(1) and the timber trespass statute, RCW 64.12.030, apply to a direct trespass against a plaintiff's timber. This creates an interpretive problem that has not yet been addressed by this Court. Removal of timber cannot be both excluded and expressly included in the ambit of RCW 4.24.630.

The *Gunn* court's interpretation of the statute fails to address the conflict between the waste statute's general provision and its exception. The *Gunn* court's interpretation of the exception, by failing to account for the conflict, renders the general provision "removes timber" entirely meaningless and of no effect. "Every person who goes onto the land of another and who removes timber" will always be liable, by definition, for timber trespass under

RCW 64.12.030 ("Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, … timber, or shrub on the land of another person…"). Under the *Gunn* court's interpretation of the exception, the first general provision written by the legislature into the waste statute can never become operative because RCW 64.12.030 would always apply, triggering the exception.

However, the legislature's inclusion of "[e]very person who goes onto the land of another and who removes timber" as the statute's first general provision articulates an intention that at least some portion of the statute's additional remedies should apply to a timber trespass. If not, the general provision, "removes timber," would be entirely meaningless. The exception would entirely swallow the rule.

The legislature itself made clear that it recognized that the waste statute should apply even when the only damage is to trees or other vegetation, when it enacted RCW 64.12.035. That statute provides immunity to electric utilities from liability "for efforts undertaken to protect their facilities from damage that might be caused by vegetation." Laws of 1999, ch. 248 (chapter summary). The first line of the statute reads, "An electric utility is immune from liability under RCW 64.12.030, 64.12.040, **and 4.24.630** … for cutting or removing vegetation…" RCW 64.12.035(1) (emphasis added). As the immunity only applies to "cutting or removing vegetation," the legislature must have understood that RCW 4.24.630 could apply even without damage to the land, otherwise there would be no need to provide this immunity.

5.3.3 This Court should harmonize the exception with the general provisions in a manner that gives effect to all of the statutory language.

The fundamental objective in statutory interpretation is to ascertain and carry out the legislature's intent. *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). "Because the surest indication of legislative intent is the language enacted by the legislature, we begin by attempting to ascertain the plain meaning of the statutory provision." *State v. Sweany*, 174 Wn.2d 909, 914-15, 281 P.3d 305 (2012). "[A]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous." *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010).

The court's interpretation of a statute must give effect to every provision. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Statutory exceptions "are narrowly construed in order to give effect to legislative intent underlying the general provisions." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013). Any doubt should be resolved in favor of the general provisions. *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

Rather than continue with an interpretation that renders portions of the statute meaningless, this Court should harmonize the provisions in a manner that gives effect to *all* of the language enacted by the legislature. *See Bunker*, 169 Wn.2d at 578. This can be done by interpreting the exception narrowly to mean that the additional remedies of RCW 4.24.630 would apply generally to "[e]very person who goes onto the land of another and who

removes timber," *except to the extent that the statute duplicates remedies already available under RCW 64.12.030.* Duplicated remedies would only be available under RCW 64.12.030. Such an interpretation allows the exception to operate narrowly without rendering the general provisions meaningless. This harmonization would leave intact RCW 64.12.030 and its existing body of case law, while still providing the additional remedies the legislature intended when it enacted RCW 4.24.630 with the words "removes timber."

This harmonization would not render the timber trespass statute meaningless, either. The waste statute would only apply, by its own terms, to a person who "goes onto the land of another" **and** "removes timber." The timber trespass statute has a broader application. For example, the timber trespass statute can apply without entry onto another's land. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 604-06, 278 P.3d 157 (2012) (holding that the timber trespass statute applies when a defendant commits a direct trespass even if the defendant is not physically present on a plaintiff's property). Additionally, the timber trespass statute applies not only to the removal of trees from the land, but also "[w]henever any person shall cut down, girdle, or otherwise injure … any tree," without removing it from the land. RCW 64.12.030. The additional remedies of the waste statute would only apply to that narrower class of cases in which a person goes onto the land of another and removes timber.

The practical result of harmonizing the provisions of RCW 4.24.630 in this manner is that the market value of the removed trees will be determined and awarded under RCW 64.12.030 and its case law, while

damages for injury to the land and litigation costs (including investigative costs and reasonable attorney fees) will be determined and awarded under RCW 4.24.630. This harmonization gives meaning to all of the provisions of RCW 4.24.630, preserves existing timber trespass case law, prevents double recovery, and provides the additional remedies the legislature intended when it enacted RCW 4.24.630 with the language, "Every person who goes onto the land of another and who removes timber."

The result can be summarized as follows:

Type of Damage Recoverable	**Applicable Statute**
Value of removed trees	RCW 64.12.030, valued in accordance with existing case law interpreting that statute
Injury to the land, personal property, or improvements on the land, including restoration costs related to such injury	RCW 4.24.630
Litigation costs, including investigation costs and attorney's fees	RCW 4.24.630
Emotional distress damages	RCW 64.12.030

This Court should interpret and apply the statutes as set forth above. Because the statutes can be harmonized in a manner that gives effect to all of the statutory language of RCW 4.24.630 without rendering any portion meaningless, there are no grounds for dismissal of George's claim under the waste statute. This Court should reverse the trial court's summary judgment

order on this issue and remand for a determination of damages under the waste statute.

6. Conclusion

The trial court erred in dismissing George's claims under the waste statute and in denying George's motion for summary judgment on the issue of the mitigation defense. There is only one reasonable conclusion from the evidence: Danielsen did not have probable cause to believe the trees were on his own land. The issue should have been decided on summary judgment rather than going to the jury. This Court should reverse and remand for tripling of damages. This Court should also overrule *Gunn*, adopt an interpretation that harmonizes the provisions of the waste statute in a way that does not render any provision meaningless, and remand this case for a determination of damages under the waste statute.

Respectfully submitted this 14th day of March, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 14, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 14th day of March, 2016.

/s/ Rhonda Davidson
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